SUPREME COURT, U. S.

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MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-581

CALIFORNIA MOVING & STORAGE ASSOCIATION, et al.,
Petitioners,

vs.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

Brief for Respondent in Opposition

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OPINIONS BELOW

The opinions of the California Public Utilities Commission (Commission), not yet reported, appear in the Appendix to the Petition (Pet. App. 1-29, 53-63). No opinions were rendered by the California Supreme Court. Instead, an order denying a petition for writ of review was issued July 17, 1974 (Pet. App. "G" at 64), and an order denying rehearing of the Court's order was issued August 28, 1974 (Pet. App. "H" at 65).

JURISDICTION

The jurisdictional requisites are set forth in the Petition. The Commission wishes to add, however, that an order of the California Supreme Court denying review of a Commission decision, even though rendered without opinion is an order on the merits both as to the law and the facts presented (*People v. Western Airlines*, (1954) 42 C.2d 621, 268 P.2d 723, appeal dismised, 348 U.S. 859, 99 L.Ed. 677).

QUESTION PRESENTED

Has the Commission, in establishing rules governing the voluntary act of providing estimates to shippers of used household goods, deprived household goods carriers of their rights to due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States?

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The constitutional provisions, statutes, and regulations involved are set forth in the Petition. However, while the Commission does not take issue with Petitioners' inclusion of tariff pages with Decision No. 82157, attached as Appendix "D" to the Petition, the Commission wishes to note that Decision No. 82157, as issued, contains a number of tariff pages not included in the copy appended to the Petition.

STATEMENT OF THE CASE

On May 22, 1972 the Assembly of the State of California adopted House Resolution No. 57 which provides, in part, as follows:

> "Resolved by the Assembly of the State of California, That the Public Utilities Commission is hereby re-

quested to accumulate evidence involving its experience under its new estimating rules; to institute proceedings concerning the problem of deliberate underestimating by household goods carriers; and therefrom to develop regulations and orders which are designed to eliminate deliberate underestimating as a competitive practice; and be it further

"Resolved, That the Commision is requested to complete its investigation and to prepare and issue orders and regulations designed to eliminate deliberate underestimating by household goods carriers as a competitive practice by March 15, 1973."

Just prior to the adoption of House Resolution No. 57, the Commission had issued its Decision No. 79571 in Case No. 5330, OSH-49, (1972) 73 Cal.P.U.C. 17, in which it established rules designed to deal with the persistent problem of industrywide underestimating. In view of the Legislature's obvious feeling that these rules were inadequate to deal with the problem, as evidenced by the resolution quoted above, the Commission issued its ORDER SETTING HEARING No. 68 (OSH 68) in Case No. 5330 on November 21, 1972, (Pet. App. "E", 57-58). OSH 68 provided that hearings would be held before the Commission commencing January 16, 1973, for the receipt of evidence relating to the problem of underestimating by used household goods carriers (carriers).

Hearings were held in January and February 1973. Thereafter, the Commission issued Interim Decision No. 81183 in Case No. 5330 on March 13, 1974, wherein it established rules designed to eliminate the practice of underestimating and set further hearings for receipt of additional evidence. These further hearings were held in April and May 1973 after which the Commision issued

Decision No. 81518 on June 26, 1973 (Pet. App. "A", 1-26). In Decision No. 81518 the Commission established the rules in controversy herein.*

The rules adopted by the Commission in Decision No. 81518, as amended and supplemented, are set forth in the Petition at pages 8 and 9. However, two points should be emphasized. The providing of estimates is, first of all, completely voluntary on the part of the carrier. Secondly, the rules apply only to the providing of estimates. The minimum rates applicable to shipments of used household goods were not directly dealt with in the instant proceedings.

The chronology of the proceedings below is set forth in the Petition at pages 10 through 15. It need only be added that on November 18, 1974 the California Supreme Court denied Petitioners' November 14, 1974 filing with that Court, which requested a stay of the implementation of the rules now in controversy pending disposition of the instant petition for writ of certiorari. On November 22, 1974, Petitioners filed their application for a stay of the implementation of Commission Decision No. 81518, as amended and supplemented, with this Court. The Commission filed its memorandum in opposition thereto on or about November 27, 1974.

ARGUMENT

Petitioners argue that they were denied due process of law in two respects. First, Petitioners contend that they were deprived of procedural due process in that the Commission allegedly established new maximum rates in a

*Rehearing of Decision No. 81518 was denied by the Commission on October 24, 1973 by Decision No. 82035 (Pet. App. "B", 27-29). On November 20, 1973 the Commission issued Decision No. 82157 wherein the specific tariff revisions implementing Decision No. 81518 were issued (Pet. App. "D", 53-55).

proceeding specifically limited to estimating practices. Secondly, Petitioners contend they are being deprived of property without due process of law by the imposition of fines under the new rules which conclusively presume guilt on the part of the carrier, without any provision for a hearing.

While Petitioners' first argument has been raised and rejected at each stage of the proceedings below, Petitioners' second argument, in part, comes as a matter of first impression in its filing addressed to this Court. Though Petitioners raised a number of arguments with regard to the manner in which they were deprived of due process in the proceedings below, nowhere can the argument be found that the imposition of a fine under the new estimating rules *without a hearing* deprives Petitioners of their property without due process of law.

Notwithstanding, the Commission submits that even if this second argument had been properly raised, neither it nor Petitioners' first argument provide a basis for granting the relief sought herein.

I.

In Establishing Rules Applicable Only to the Providing of Estimates by Carriers, the Commission Has Not Specifically Dealt with the Applicable Minimum Rates.

The rules established by the Commission are applicable only to shipments wherein a carrier chooses to provide an estimate. None of the Commission's decisions involved herein amend minimum rates. Petitioners, nonetheless, argue that the Commission has established a new de facto minimum, or as Petitioners suggest, "maximum" rate, and has done so without affording the parties appropriate notice or the opportunity to present evidence as to the reasonableness of these rates. In support of their argument Petitioners submit that the Commission has previously acknowl-

edged, in a prior Commission proceeding involving household goods estimates, that a proposal limiting the charge to the shipper to the estimate plus ten percent would be an indirect attack on the minimum rate structure.

Even if such a proposal, alone, does constitute an indirect attack on minimum rates, and was for that reason once rejected by the Commission, this does not preclude its inclusion as one of the rules adopted in the instant proceedings. Thus, rules regarding estimates may indirectly affect the maximum charge that may be assessed by a carrier who chooses to provide an estimate. This does not, however, transform the proceeding into a ratemaking proceeding. Petitioners' authorities, which relate solely to ratemaking proceedings, are, therefore, not applicable to the instant proceedings.

Furthermore, the Commission does not agree that the rules established are in any way destructive of the established minimum rate structure. The concept of a maximum charge coupled with a penalty provision directly linked to the amount of deviance from minimum rates, as adopted by the Commission herein, in fact preserves the minimum rate structure by giving carriers an additional incentive to keep established minimum rates well in mind when providing estimates.

In a proceeding before the Commission held long before the procedings here at issue, the Commission found that in almost all instances carriers could provide reliable and accurate estimates with minimum rates well in mind (*California Moving & Storage Association v. Public Utilities Commission*, (1964) 63 Cal. P.U.C. 702, 709). In view of the obvious failure of carriers to do so, the Commission has merely attempted to make the provision of estimates

more reliable for shippers, while at the same time attempting to preserve minimum rates.

Petitioners acknowledge that estimates are not required, but contend that ". . . no carrier could refuse to give estimates and long remain a viable business entity . . ." (Pet., 19). The Commission submits that if estimates are as important as Petitioners suggest, this merely represents an additional reason why the public interest requires more stringent rules regarding the estimating practices of carriers.

Based on the above, Petitioners' arguments should be rejected.

II.

The Imposition of Fines by the Commission Does Not Deprive Petitioners of Their Property Without Due Process of Law.

Petitioners argue that "[t]he imposition of fines or penalties *without a hearing* . . ." (Pet., 21, emphasis supplied) and the alleged utilization of a conclusive presumption of carrier fault, deprive carriers of property without due process of law.

At the outset, the Commission must again note that Petitioners did not at any point in the proceedings below raise the argument that a hearing is required prior to the imposition of a fine. Petitioners have, by failing to raise this argument below, not perfected their right to a decision on this question by this Court (*Williamson v. Weyerhaeuser Timber Company,* (9 Cir. 1955) 221 F.2d 5, 14; *Cox v. City of Freeman,* (8 Cir. 1963) 321 F.2d 887, 891; *United States v. Vitasafe Corporation,* (2 Cir. 1965) 352 F.2d 62). This Court has, itself, previously noted that it will not consider issues which were neither raised nor considered in the proceedings below (*Monks v. New Jersey,* (1970) 398 U.S. 71, 26 L.Ed.2d 54; *Adickes v. Kress & Co.,*

(1970) 398 U.S. 144, 26 L.Ed.2d 142; *Pickering v. Board of Education,* (1968) 391 U.S. 593, 20 L.Ed.2d 811).

However, even if it were assumed that Petitioners properly presented the above argument for the Court's consideration, the Commission submits that there is no deprivation of property without due process occasioned by imposition of the fine provided for in the Commission's rules.

A hearing was held regarding the rules in controversy herein. Petitioners actively participated in these hearings and presented evidence and their own proposals as to the rules which have been adopted. Thus Petitioners' due process rights were satisfied regarding the rules that were established.

In addition, the rules provide for a hearing in the event that a deliberate underestimate has occurred. Petitioners acknowledge this fact.

Finally, the rules provide for an Addendum Order for Service whenever goods are to be shipped in addition to those specifically covered by an estimate, regardless of the reason for the addition. Thus, Petitioners' claim that shippers ". . . may deliberately conceal goods to be shipped . . ." (Pet., 25) must be rejected.

Petitioners advance no explanation of how a shipper could mislead or defraud a carrier. The Commission has in fact removed the possibility that a shipper can, for whatever reason, affect the final charge for those goods covered by the estimate. It has done so in an effort to protect the carrier. Thus, even if a presumption of fault has been placed on the carrier, it is not, in view of the above, an unwarranted presumption.

III.

There Is an Overwhelming Public Interest Involved in Implementation of These Rules.

The Commission respectfully submits that the rules of which Petitioners now complain are merely a well related means to achieve a legitimate end, the elimination of underestimating abuses which had become a frequently used, industrywide competitive tool. Perhaps the clearest statement of where the real injury will occur if implementation of these long overdue rules is further delayed, comes from the affidavit attached to Petitioners' application for stay of the Commission's decisions, which was filed with the Court on November 22, 1973.

The Affiant therein states that approximately 29.4 percent of all long distance moves for which estimates are provided involve underestimates, and implies that an even greater percentage is involved in the case of local moves. In view of the Commission's findings made long before the instant proceedings, that reliable and accurate estimates could be provided by carriers with little or no difficulty, it becomes quite clear that it is the public, and not carriers, who are sustaining the real injury by additional delay in implementation of the rules.

The Commission has responded to this problem by adopting rules which, hopefully, will prevent the perpetuation of underestimating as a competitive tool, rather than, as estimates should be, an aid to the shipper. It has done so as a reasonable exercise of the discretion vested in it for this very purpose.

Petitioners' assertions that by implementation of the rules they are being deprived of their constitutional guarantees do not, in view of the above arguments, transform the instant proceeding into one involving an important federal question.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari be denied.

Respectfully submitted,

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